No. 03-19-00501-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

KEN PAXTON, ATTORNEY GENERAL,
Plaintiff-Appellant,

v.

CITY OF AUSTIN; MAYOR STEVE ADLER; ORA HOUSTON; DELIA GARZA; SABINO RENTERIA; GREGORIO CASAR; ANN KITCHEN; DON ZIMMERMAN; LESLIE POOL; ELLEN TROXCLAIR; KATHIE TOVO; AND SHERI GALLO, EACH IN THEIR OFFICIAL CAPACITY,
Defendants-Appellees.

On Appeal from the
53rd Judicial District Court, Travis County

BRIEF FOR PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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Statement of the Case

Nature of the Case: Defendants, the City of Austin and a number of its officials, prohibit individuals licensed to carry a concealed handgun from bringing a concealed handgun into City Hall. The City has implemented that policy by posting an interdictory circle containing a handgun on the doors at the building's entrance and by ordering security officers to orally instruct visitors that they may never enter with a handgun. Plaintiff, the Texas Attorney General, sued for daily civil penalties and a writ of mandamus under Texas Government Code § 411.209.

Course of Proceedings: The trial court granted the City's plea to the jurisdiction in part, dismissing the Attorney General's claim that the interdictory circle violates the law. The district court held a two-day trial regarding the Attorney General's remaining claims based on the security officers' oral communications.

Trial Court: 53rd Judicial District Court, Travis County
The Honorable Lora J. Livingston

Trial Court Disposition: The trial court found the Attorney General met his burden to prove the City violated § 411.209(a) on six discrete days, but that he failed to show a violation on any other days over two-year period. Accordingly, the trial court awarded $9,000 in fines ($1,500 for each violation), $25,000 in attorney's fees, and $10,952.10 in costs.

Statement Regarding Oral Argument

This appeal involves novel questions of statutory interpretation. No Court of Appeals has authoritatively interpreted S.B. 273. That law is designed to provide concealed carry license holders clarity regarding their ability to carry a gun into public buildings. The trial court interpreted the law to do the opposite—permitting municipalities to maintain policies excluding license holders while keeping them in the

dark about the reasons why. This appeal also raises important questions about the calculation of civil penalties. Like the statute at issue here, countless others impose *per diem* fines for continuing violations of law. The lower court's approach to calculating penalties, however, would gut this statute—and many others the Attorney General is tasked with enforcing. Under S.B. 273, the City is liable for more than $5 million in penalties after deliberately impeding handgun owners' rights for years. The trial court instead imposed only $9,000 in penalties. Oral argument will assist the court in resolving these important questions.

Issues Presented

1. Texas Government Code § 411.209(a) bars "communication[s]" or "sign[s]" wrongfully communicating that a license holder may not bring a handgun onto government property. Does that proscription include posting a sign that depicts a gun inside an interdictory circle—the universal symbol of prohibition?
2. Texas Penal Code § 46.03(c)(3) prohibits license holders from possessing a handgun "on the premises of any government court." Does that permit a municipality to prohibit handguns from an entire building where only a portion of that building is being used to hold a court meeting?
3. Texas Government Code § 411.209(c) imposes cumulative civil penalties for each day of a "continuing violation." Where uncontroverted evidence shows a pattern of violations over a three-year period pursuant to an ongoing policy, must the Attorney General nevertheless introduce affirmative evidence for hundreds of individual days to show a "continuing violation"?

4. Texas Government Code § 411.209(b)(2) requires a court to impose heightened civil penalties—a minimum of $10,000 each—for any "subsequent violation" of the law. Where a court finds multiple violations, may that court nevertheless impose fines of less than $10,000 each?
5. Where a trial court misconstrues the substantive law defining liability, undercounts the number of violations, and assigns the wrong civil penalty for those violations that it finds, should that court reassess its attorney's fees determination?

Introduction

Texas law has long authorized law-abiding Texans to carry a concealed handgun in most public places after complying with a detailed licensing regime. That includes permission to carry a handgun in nearly all government buildings. For years, however, municipalities like the City of Austin have resorted to all manner of chicanery to thwart gun owners' rights under state law. Time and again, the Texas Legislature has responded with efforts aimed at ending municipalities' defiance of state gun laws.

One of the Legislature's latest efforts, S.B. 273, sought to clarify municipalities' duties with respect to license holders and to provide an enforcement mechanism with teeth. The law says that municipalities may not notify visitors—by means of a "communication" or "sign"—that license holders are prohibited from entering government property with a handgun, unless state law would actually prohibit them from entering. Tex. Gov't Code § 411.209(a). If a City fails to comply with that obligation, the Attorney General may sue to recover civil penalties—starting at $1,000 for the first day the City violated the law and then $10,000 for every day after that. *Id.* § 411.209(b)-(c).

The City of Austin responded to S.B. 273's passage with maneuvers seeking to evade the law's reach in an effort to continue prohibiting license holders from entering City Hall with a handgun. Although it acknowledged that the law required it remove an existing sign notifying all visitors that handguns were prohibited, it nevertheless continued to maintain a policy (established in 2004) of barring all handguns

from the building. In an act of obfuscation, the City affixed an interdictory circle containing a handgun to the entrance doors. For good measure, it instructed security officers just inside the building to issue uniform verbal warnings that handguns are always prohibited.

After the Attorney General sued under S.B. 273, the trial court found that the City had, in fact, violated the law on six discrete occasions. But the trial court nevertheless misconstrued the law in important respects—namely, by concluding the interdictory circle was not a "communication" or a "sign" and by requiring the Attorney General to provide direct evidence of the City's daily acts in order to prove a "continuing violation." The court also opened the door to increased criminal liability for gunowners by concluding that the Texas Penal Code prohibits handguns from an entire building where only a portion of that building is being used as a court. Completely independent of those errors, the trial court misapplied the law governing "continuing violations" statutes. Properly applying state law, the City is liable for more than $5 million. Instead, the trial court imposed $9,000 in penalties—the monetary equivalent of a slap on the wrist.

Taken together, these errors ensure that municipalities may continue to evade the clear meaning of state gun laws. This case presents a critical opportunity to give effect to the Legislature's considered choice in passing S.B. 273.

Statement of Facts

I. Background

Nearly thirty years ago, the Texas legislature passed a law authorizing Texans to carry a concealed handgun after complying with a detailed licensing scheme. *See* Act of May 16, 1995, 74th Leg., R.S., ch. 229, §§ 1-11, 1995 Tex. Gen. Laws 1998 (codified at Tex. Gov't Code §§ 411.171 et seq. and Tex. Penal Code §§ 46.03, 46.035). A license permitted a license holder to carry a handgun—so long as the gun was "not openly discernible." *Id.* § 1. But the law carved out certain spatial and circumstantial exceptions. For example, it prohibited a license holder from carrying a concealed handgun into bars, interscholastic events, jails, hospitals, theme parks, and houses of worship. *Id.* § 4. And it prohibited him from carrying a concealed handgun into a government meeting or while intoxicated. *Ibid.* Anywhere else, and under any other circumstances, a license holder had the right to carry a concealed handgun.

In 2003, the legislature made things even clearer. It explained that license holders cannot be held criminally liable for carrying a handgun onto property "owned or leased by a governmental entity." *See* Act of May 23, 2003, 78th Leg., R.S., ch. 1178, § 2, 2003 Tex. Gen. Laws 3364 (codified at Tex. Penal Code § 30.06). The only pertinent exception made it a criminal offense to possess a weapon "on the premises of any government court or offices utilized by the court." *Id.* § 3 (codified at Tex. Penal Code § 46.03). In general, then, a license holder carrying a handgun had the right to access government buildings on equal terms with his fellow citizens.

But that right was often not a reality. Over time, municipalities began posting signs in an effort to dissuade license holders from carrying concealed handguns

where and when they were lawfully permitted. For example, the Kidd Springs Recreation Center in Dallas posted a sign that warned "CARRYING A FIREARM ON THESE PREMISES IS PROHIBITED." *State Law Takes Aim at Cities' and Counties' Gun Bans*, Dallas Morning News (Aug. 23, 2015), https://bit.ly/2kHb3CQ. Collin County posted a similar "NO FIREARMS" sign at the entrance of its land appraisal office. *Ibid.* Both were undoubtedly government property where a license holder was permitted to carry a concealed handgun.

II. Passage of S.B. 273

In 2015, the Texas Legislature sought to address this growing problem by passing S.B. 273. The bill's title tells much of the story: "Wrongful Exclusion of Handgun License Holder." Senator Donna Campbell, the bill's sponsor, noted that cities like Austin had turned laws regarding gun signs up-side down. Signs were intended to provide citizens with clarity; instead local governments had manipulated them to create confusion and "intimidate or coerce law-abiding gun owners from carrying [handguns] where it's legal." Hearing on Tex. S.B. 273 Before the Senate Committee on State Affairs, 84th Leg., R.S. 1:01:30-1:01:50 (March 2, 2015), https://bit.ly/2rsqe5Q.

To make matters worse, existing law provided no penalty or other "enforcement mechanism" for correcting local governments that deliberately thwarted the license-to-carry regime. *See* Senate Research Ctr., Bill Analysis, Tex. S.B. 273, 84th Leg., R.S. at 1 (2015). Instead, local governments were simply "expected to comply." Hearing on Tex. S.B. 273 Before the Senate Committee on State Affairs, 84th Leg., R.S. 1:08:15-1:08:30 (March 2, 2015), https://bit.ly/2rsqe5Q. S.B. 273 thus sought

to provide the enforcement mechanism that existing law lacked and to restore the clarity that local governments had taken away. *See* House Homeland Sec. & Pub. Safety Comm., Bill Analysis, Tex. S.B. 273, 84th Leg., R.S. at 1 (2015); House Research Org., Bill Analysis, Tex. S.B. 273, 84th Leg., R.S. at 3 (2015) ("SB 273 would reduce confusion among law-abiding licensed concealed handgun holders as to where they were allowed to carry their handguns.").

The law's text implements these goals. First, it imposes a duty on government entities. It says that a political subdivision of the State

> [1] may not provide notice by a communication described by Section 30.06, Penal Code, or by any sign expressly referring to that law or to a concealed handgun license, [2] that a license holder carrying a handgun under the authority of this subchapter is prohibited from entering or remaining on a premises or other place owned or leased by the governmental entity [3] unless license holders are prohibited from carrying a handgun on the premises or other place by Section 46.03 or 46.035, Penal Code.

Tex. Gov't Code § 411.209(a). Thus, a municipality may not inform a license holder—either by a "sign" or some other "communication"—that he would be prohibited from entering government property unless the Texas Penal Code *actually* prohibits him from entering.

Second, the law permits private citizens, working with the Attorney General, to prevent municipalities from shirking this duty. It provides that any Texas citizen or license holder "may file a complaint with the attorney general that a [municipality] is in violation of Subsection (a)." *Id.* § 411.209(d). The Attorney General, in turn, must investigate the complaint and, if legal action is warranted, notify the municipality of the possible violation. *Id.* § 411.209(f). If the municipality does not cure the

violation within 15 days, the Attorney General may sue to collect civil penalties—up to $1,500 for the first violation and up to $10,500 for each subsequent violation. *Id.* § 411.209(b). Each day the municipality continues to violate the statute "constitutes a separate violation" triggering a $10,000 penalty. *Id.* § 411.209(c). On top of that, the Attorney General may seek a writ of mandamus and recover costs "incurred in obtaining relief under this section." *Id.* § 411.209(g).

It is worth noting what S.B. 273 did *not* do: For the most part, it did not alter where a license holder is prohibited from carrying a handgun. *See* Senate Research Ctr., Bill Analysis, Tex. S.B. 273, 84th Leg., R.S. at 1 (2015). Instead, the law simply cross-referenced the existing prohibitions in the Texas Penal Code. *See* Tex. Gov't Code § 411.209(a) (citing Tex. Penal Code § 46.03 and § 46.035).[1]

Some municipalities swiftly complied. Tarrant County, for example, provided a model of compliance. After the law became effective, the County moved its signs prohibiting guns from the entrance of the county courthouse to just "in front of the area where justice of the peace courts are." Anna M. Tinsley, *New Texas Law Takes Aim at Erroneous Gun-Ban Signs*, FORT WORTH STAR TELEGRAM (Aug. 29, 2015),

[1] Earlier this year, the Texas Legislature again passed legislation addressing efforts to circumvent the law—like the City's here. *See* Act of May 21, 2019, 86th Leg., R.S., ch. 784, §§ 1-3, Tex. Gen. Sess. Law Serv. 2228-29 (codified at Tex. Gov't Code § 411.209). Section 411.209's text now prohibits "tak[ing] any action . . . that states or implies" that a license holder is prohibited from entering. Because the new provision operates prospectively from September 1, 2019, the prior version governs the City's conduct in this case. But this merely highlights why the new law should have been unnecessary: The City's conduct was—and remains—unlawful. All citations in this brief to § 411.209 are to the 2015 version of the statute.

https://bit.ly/2ksmJsW. The County recognized that, under the new law, "[g]uns are still barred at court hearings and meetings of government agencies, but not from the entire building." *Ibid.*; *accord* House Research Org., Bill Analysis, Tex. S.B. 273, 84th Leg., R.S. at 5 (2015) (noting opponents objected that the bill "would require the placement of metal detectors at the door to each meeting instead of locating the metal detector and handgun monitoring at the building's entrance").

III. Attorney General Investigation

Other municipalities took a different tack. The City of Austin, for its part, chose to do nothing. On the day the law took effect, a license holder named Michael Cargill went to City Hall. 2RR.55. There he discovered a sign indicating that Texas Penal Code § 30.06 barred license holders from entering with a concealed handgun. 4RR, P. Ex. 4 at 3-4. When Cargill notified City officials that it was violating S.B. 273, one Councilmember was shocked to discover the sign was still up: "Yeah, they—they have a right to carry in here." *Austin City Hall Removes Signs Prohibiting Concealed Carry*, Fox 7, 1:40-2:00 (Sept. 1, 2015), https://bit.ly/34vo4AY.

Cargill promptly filed a complaint with the Attorney General. 4RR, P. Ex. 5. He explained that, although license holders are not prohibited from entering City Hall, the City of Austin was telling the opposite to anyone who attempted to enter because it treated City Hall as a "government court." 4RR, P. Ex. 5 at 4-5. The Attorney General's office notified the City of Cargill's complaint. 4RR, P. Ex. 75 at 1. Shortly thereafter the City responded that it had removed the sign, effectively conceding that handguns are permitted inside City Hall. 4RR, P. Ex. 75 at 3; *cf.* CR.2154; 2RR.194.

Believing the City now intended to comply with the law, the Attorney General closed the complaint. 4RR, P. Ex. 22 at 1.

On April 4, 2016, Cargill returned to City Hall. 2RR.58. The former sign was nowhere to be found. Instead, Cargill encountered an interdictory circle on the glass door at the building's entrance:

4RR, P. Ex. 8 at 5. And after he entered those doors, Cargill encountered a security officer, an x-ray machine, and a magnetometer. 4RR, P. Ex. 18. When Cargill asked whether a license holder could enter with a concealed handgun, the officer said no: "It's like a court. They have court here once a month." *Ibid.* Cargill sought clarification from the head of security, who likewise asserted that Cargill could not enter because "this facility is a courthouse." *Ibid.*

Two days later—on April 6, 2016—Cargill returned to City Hall. 2RR.62. Once again, security officers insisted he could not enter with a concealed handgun because the City considered the building a court. *Ibid.* This time, however, Cargill asked if he

could speak with the law department to make sure the City's lawyers "knew what [its] security staff was actually doing." 2RR.63. Although Cargill waited "for quite a while" at the building's entrance, "[n]o one came down to talk to" him. *Ibid.* Despite the City's refusal to explain its policy, on both of his visits Cargill provided letters to City officials explaining why that policy violated state law. 2RR.64; 4RR, P. Ex. 7.

Because the City persisted in excluding license holders from City Hall, Cargill filed a new complaint with the Attorney General. 4RR, P. Ex. 8; 4RR, P. Ex. 74 at 27. Cargill's submissions included photographs of the glass doors at the entrance and video of his encounter inside City Hall. 2RR.116-17. On April 12, 2016, Cargill came to City Hall a third time—this time without his handgun—and confirmed that nothing had changed. 2RR.113-14.

As required by S.B. 273, the Attorney General's office began investigating Cargill's renewed complaint. *See* Tex. Gov't Code § 411.209(f); 4RR, P. Ex. 10. On July 1, 2016, Captain Gregory Lucas visited City Hall and found the situation just as Cargill described it. At the entrance, he encountered an interdictory circle containing a handgun permanently affixed to the glass door; just inside, a security guard informed him that a license holder may not enter with a handgun because the building is a courthouse. CR.138-39; 4RR, P. Ex. 74 at 45. Based on this information, the Attorney General notified the City it had fifteen days to cure the violation. 4RR, P. Ex. 1 at 2. When the City refused, the Attorney General sued for penalties and a writ of mandamus. CR.9-20.

Captain Lucas continued to monitor the situation, visiting City Hall three more times. 3RR.80. On July 29, 2016, Captain Lucas sought to determine whether City Hall contained a "court" of any kind. He asked a security officer and a Clerk's Office employee for a directory of offices contained in the building. Neither individual indicated that City Hall contained a court. CR.139-40; 4RR, P. Ex. 74 at 45. On August 12, 2016, Captain Lucas observed "the same set-up"—interdictory circle at the entrance and security checkpoint just inside the doors—so he turned around and left. CR.140; 4RR, P. Ex. 74 at 45-46.

And on September 7, 2016, Captain Lucas paid a final visit accompanied by Lieutenant Tim Ferguson. 3RR.93. On that occasion, four different security officers told Lieutenant Ferguson he could not enter with his handgun. CR.140-42, 150-52. When Ferguson asked for an explanation, one officer began to search for "paperwork" that provided the procedure he was supposed to follow. *See* 4RR, P. Ex. 3 at 0:45-4:21. Finally, he produced the following talking points:

> THE FOLLOWING STATEMENT IS TO BE USED FOR ANYONE WHO CHALLENGES OUR WEAPONS POLICY!!
>
> "WEAPONS ARE NOT ALLOWED IN CITY HALL, BECAUSE IT IS DESIGNATED AS A COURT FACILITY"!
>
> REPEAT IF NECESSARY, DO NOT ADD OR OMIT ANY VERBIAGE FROM THE STATEMENT ABOVE!! ONLY IF VISITOR REQUESTS TO SEE OUR POLICY, HAND THEM A COPY OF OUR "GUIDANCE OF WEAPONS AT CITY FACILITIES" BULLETIN. NOTIFY PIO OFFICE AS WELL.

Id. at 5:18-5:40 (emphases original). When Lucas asked a supervisor "what kind of Court" sits at City Hall, he responded: "It's irrelevant." *Id.* at 7:10-7:42. The Attorney General amended his petition to include details from these visits, CR.50-62 and

moved for summary judgment, CR.80-163. The City moved to dismiss the suit in plea to the jurisdiction. CR.189-267.

IV. Trial Court Proceedings

The trial court denied the Attorney General's motion for summary judgment and most of the City's plea. CR.388. In a letter, the court explained its decision granting the City's plea with respect to the interdictory circle posted at the entrance to City Hall. First, the court concluded that the universal sign of prohibition—a handgun inside of a circle with a line slashed through it—was not a "sign" or "communication" for purposes of § 411.209(a) because it did not contain specific wording. *Id.* at 378-83. Second, the court concluded that the City may ban handguns from all of City Hall, not just that portion of the building being used as a court. *Id.* at 383-85. Later, the court denied the City's traditional and no-evidence motions for summary judgment, *id.* at 2455-56, and set the case for a bench trial on January 7, 2019.

At trial, the Attorney General presented detailed testimony showing that the City consistently prohibited license holders from entering City Hall with a concealed handgun. Cargill testified that the "overall message" from his visits was clear: "[T]he City of Austin would definitely arrest me if I was to walk into the building as a license holder carrying a handgun." 2RR.70. Captain Lucas likewise testified that he thought a license holder would be arrested if he entered with a concealed handgun. 3RR.89-93. Neither of them was ever able to locate a court inside City Hall. 2RR.81; 3RR.96. But both consistently received oral and visual indications that handguns were always prohibited. And the threat of arrest was supported by the City's

own public statement in a press release that "[i]t is *a criminal offense* under Texas State Law" possess handgun in City Hall. 4RR, P. Exs. 83, 84 (emphasis added).

Testimony from City employees confirmed that what Cargill and Lucas observed on seven discrete days occurred *every* day. David Lothery, Security Manager for the City's Building Services Department, confirmed the interdictory circle affixed to the entrance is a generic symbol meaning no weapons, including handguns, 2RR.126-27; that security officers "use that same speech [barring handguns] every time we're open, 24/7," *id.* at 142; that security officials might ultimately contact police if a license holder refuses to accede to "verbal persuasion," *id.* at 182-87; and that "the goal of the procedure" is to prevent anyone from taking a handgun into City Hall, *id.* at 134-35. Eric Stockton, a Building Services Officer, told a similar story. He stated that the City has prohibited all handguns inside City Hall since 2004, *id.* at 220-21; that its policy is based on the Texas Penal Code, *id.* at 196; that the interdictory circle is "a universal symbol" prohibiting weapons, including handguns, *id.* at 198; and that he trains officers to use the "script" to exclude all handguns, *id.* at 207.

Rather than denying this uniform policy, the City responded that license holders are, in fact, "prohibited from carrying a handgun on the premises" of City Hall at all times. Tex. Gov't Code § 411.209(a). (Of course, the City has tacitly conceded otherwise throughout this case by admitting that "SB273 prohibited the posting of" the original sign that the City voluntarily removed in September 2015. *See* CR.2154; 2RR.194.) At trial, the City argued principally that City Hall is a "government

court" because it occasionally hosts Community Court and Teen Court in various rooms of the building. 3RR.23-26; Tex. Penal Code § 46.03(a)(3).

The evidence, however, revealed just how thin the City's government-court theory really is. Lothery testified that Community Court meets one day per month (the second Monday), 2RR.123; 4RR, P. Ex. 58, and that Teen Court meets two days per month (the second and fourth Thursday), 2RR.122; 4RR, P. Exs. 39, 55. But the record demonstrates that Community Court sometimes meets *less* than once a month.[2] And Teen Court meets from 6:00 PM to 8:00 PM, 2RR.122; 4RR, P. Ex. 39, well after City Hall closes to the public at 5:00 PM, 4RR, P. Ex. 80 at 2. Thus, evidence showed that City Hall hosts a "court" during business hours roughly 11 days out of the year.

The trial court ultimately concluded that the City violated § 411.209(a) on six different days: April 4, 2016; April 6, 2016; April 12, 2016; July 1, 2016; July 29, 2016; and September 7, 2016. CR.2685. But it concluded the Attorney General "did not meet its burden to establish a violation on any other date." *Ibid.* And it awarded only $9,000 in civil penalties—$1,500 for each of the six violations. *Id.* at 2686. Based on

[2] *See* 4 RR, Defendant's Ex. 12 at 1010 (December 28, 2015), 1035 (February 8, 2016), 1054 (March 7, 2016), 1057 (April 11, 2016), 1067 (May 9, 2016), 1075 (June 13, 2016), 1087 (July 11, 2016), 1094 (August 8, 2016), 1099 (September 12, 2016), 1110 (October 10, 2016), 1120 (November 14, 2016), 1126 (December 12, 2016), 1128 (January 9, 2017), 1130 (February 13, 2017), 1134 (March 6, 2017), 1136 (April 10, 2017), 1138 (May 8, 2017), 1144 (June 12, 2017), 1157 (July 10, 2017), 1163 (August 14, 2017), 1177 (September 11, 2017), 1189 (October 9, 2017), 1201 (November 13, 2017), 1205 (December 11, 2017), 1208 (February 12, 2018), 1213 (April 9, 2018), 1217 (May 14, 2018).

that limited recovery, the court awarded attorney's fees and costs and entered final judgment. *Id.* at 2934-36. The Attorney General timely appealed. *Id.* at 2929-31. The City has not appealed any of the issues on which it lost below.

Summary of the Argument

The trial court correctly found that the City violated S.B. 273 on 6 occasions, but it nevertheless misconstrued the law in other important respects.

First, the court took too narrow a view of what kind of notice comes within the law's scope. An interdictory circle containing a handgun is a "communication" or "sign" within the meaning of § 411.209(a). Whether viewed as a communication or a sign, that symbol conveys the message with which Texas Penal Code § 30.06 is principally concerned—that entry onto property with a handgun is forbidden. Neither word requires recitation of specific verbiage to come within the statute's ambit. The trial court's contrary reading mistakes the ordinary definition of those words and their surrounding phrases, and ultimately produces a statute that does not do the one thing it was designed to do.

Second, the court took too broad a view of where a municipality is permitted to ban handguns. The fact that a license holder may not bring a handgun onto the "premises of a government court" does not mean that the City may prohibit handguns from an entire building just because it uses a portion of that building a portion of the time to host a government court. Statutory cross-references demonstrate that a license holder is barred from carrying a handgun in an entire building only if that entire building is used as a government court. A license holder is *not* barred from carrying a handgun in an entire building because a portion of that building is being

used as a government court. The trial court reached the opposite conclusion by flouting basic rules of English grammar and ignoring the surrounding statutory context.

Third, and entirely independent of its misunderstandings of the law's substantive provisions, the trial court applied the wrong law when determining the number of violations and calculating the appropriate civil penalty. The City has affixed an interdictory circle to the door that welcomes visitors to City Hall 365 days per year. And security officers provide oral notice day in and day out that handguns are absolutely prohibited. The City did not meet its burden to rebut the presumption that it has continuously violated the law for more than two years. Accordingly, the City is liable for far more than the six violations the trial court found. Moreover, each day of violation after the first one—whether there were 500 or 5—should have led to a $10,000 fine. The City properly owes more than $5 million in civil penalties, not the paltry $9,000 the trial court ordered.

Finally, because the trial court erred in assessing the appropriate civil penalties, it must also reexamine the proper amount of attorney's fees.

ARGUMENT

The trial court got many things right in its final verdict. For example, it correctly recognized that the oral notice security officers provide at the entrance to City Hall is a covered "communication" under S.B. 273. It correctly concluded that municipalities may ban handguns from a building based on the government-court exception only on those days that a court is operating. And it correctly rejected the City's attempts to rely on other alleged justifications for excluding handguns, like the occurrence of open meetings or school-sponsored activities. The City has not appealed

any of those aspects of the judgment below. *See* Tex. R. App. P. 25.1(c); *Solotko v. LegalZoom.com, Inc.*, No. 03-10-00755-CV, 2013 WL 3724770, at *7 (Tex. App.—Austin July 11, 2013, pet. denied). But the trial court nevertheless erred in finding the City liable for only six discrete violations and in setting the appropriate penalties.

I. The Trial Court Erred in Granting the City's Plea to the Jurisdiction Because It Misunderstood What Kinds of Notice S.B. 273 Covers and Where a Municipality May Lawfully Prohibit Handguns.

The trial court erred in two important respects when it partially granted the City's plea to the jurisdiction. It concluded that the interdictory circle on the glass doors at City Hall's entrance is not a "communication" or a "sign." And it concluded that the City may prohibit handguns from the entire building even though only a portion of it is being used as a court. Based on that reading of the statute, the court concluded that the Attorney General could not establish liability for the interdictory circle, and therefore the City's immunity from suit was not waived as to that claim. *See* Tex. Gov't Code § 411.209(h). This Court reviews those legal questions *de novo*. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 451 (Tex. 2016).

A. An interdictory circle containing a handgun is a "communication" or a "sign" prohibiting a license holder from entering with a handgun.

Section 411.209(a) says that a municipality "may not provide notice [i] by a communication described by Section 30.06, Penal Code, or [ii] by any sign expressly referring to that law or to a license to carry a handgun, that a license holder carrying a handgun under the authority of this subchapter is prohibited from entering" unless

a license holder would actually be prohibited. Under the plain terms of the statutory text, the interdictory circle at City Hall triggers this provision under either framing.

Communication. The interdictory circle at issue here is "a communication described by Section 30.06." A communication consists of "facts or information communicated." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 460 (2002); *see also* NEW OXFORD AMERICAN DICTIONARY 351 (3d ed. 2010). And it may take many forms. A communication may be orally conveyed, written down, or acted out. *See* BLACK'S LAW DICTIONARY 337 (10th ed. 2014) ("1. The interchange of messages or ideas by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. 2. The messages or ideas so expressed or exchanged.").

It blinks reality to suggest that City Hall's interdictory circle does not express or communicate a "message." Semiotic theory (the study of symbols and signs) recognizes that the interdictory circle universally communicates: "No _____." ADRIAN FRUTIGER, SIGNS AND SYMBOLS: THEIR DESIGN AND MEANING 349–50 (1989). At trial, City employees testified that they too understood the symbol to mean that the City bans *all* weapons from City Hall—including the handgun the image depicts. 2RR.126-27, 198. The message the symbol unambiguously conveys is that "entry on the property by a license holder with a concealed handgun [i]s forbidden." Tex. Penal Code § 30.06(a)(2).

The trial court reached a different answer by adopting an overly crabbed reading of the statute. CR.377. It concluded that, because § 411.209(a) refers to a "communication *described by* Section 30.06," it therefore incorporates that section's definitional provisions. Section 30.06, the court noted, refers to "notice to the person by

oral or written communication." Tex. Penal Code § 30.06(b). And it defines "written communication" as a sign, card, or other document "on which is written language identical to the following: 'Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun'." *Id.* § 30.06(c)(3). Thus, the court concluded, the interdictory circle could not qualify because it does not contain that verbatim transcription. CR.379.

That interpretation is wrong for several reasons. First, it overreads two words in the phrase "described by Section 30.06." *See In re Volkswagen Clean Diesel Litig.*, 557 S.W.3d 78, 86 (Tex. App.—Austin 2017, no pet.) (chiding litigant for overreading). The pertinent question is: Described *where* in § 30.06? Tellingly, § 411.209(a) directs a reader to the entirety of § 30.06—not just § 30.06(c)(3). Viewed as a coherent whole, § 30.06 is concerned with "oral or written" communications providing notice that entry onto property with a handgun is forbidden. *Id.* § 30.06(a)(2). The trial court's reading, by contrast, is incoherent. Consider the fact that it found the City liable for six *oral* communications. If "described by" means that § 30.06(c)'s definitional provisions provide all the content for "communication" in § 411.209(a), then what do we do with the fact that § 30.06(c) does not "describe" oral communications at all? If the Legislature meant to incorporate § 30.06's definitional provisions by reference, there are clearer ways to do that. *See Ex parte Elliott*, 973 S.W.2d 737, 741 (Tex. App.—Austin 1998, pet. ref'd).

Second, that reading is patently absurd. *See* ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW 235 (2012) ("What the rule of absurdity seeks to do is what all rules of interpretation seek to do: *make sense* of the text."). A couple of examples suffice to show why the trial court's interpretation makes no sense. If a communication comes within § 411.209(a) only if it is "written [in] language identical" to § 33.06(c)(3)(A), then a municipality may avoid liability by adding a single word.

> Pursuant to Section 30.06, **the** Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun

It could do the same thing by altering one punctuation mark.

> Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun.

That makes a mockery of a statute focused on policing municipalities' efforts to skirt the law. *See* Tex. Att'y Gen. Op. KP-0049, 2015 WL 9434997, at *4 (Dec. 21, 2015).

The trial court's reading "would allow [municipalities] to end-run the specifically enacted scheme for enforcement" of license holders' right to carry a concealed handgun. *Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 856 (Tex. App.—Austin 2018, pet. denied). No "rational Legislature" could have a passed a law that did not do the *one thing* it aimed to do. *Comm'n for Lawyer Discipline v. Rosales*, 577 S.W.3d 305, 312 (Tex. App.—Austin 2019, pet. filed). Perhaps that's why even the trial court recognized that its interpretation "is likely an absurd result and counter to the Legislature's intent of Section 411.209." CR.382.

Sign. The interdictory circle is also "a sign expressly referring to" § 30.06 or a concealed handgun license. A "sign" is "a conventional mark or device having a recognized particular meaning and used in place of words." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2115 (2002). Interdictory circles function in just this way all around us every day. Rather than writing out "Smoking on board an aircraft, including in the aircraft lavatory, is a violation of federal regulations," an airline simply depicts an interdictory circle containing a cigarette in the airplane's lavatory. Rather than writing out "Swimming in this area is forbidden by local ordinance in light of recent shark attacks," beach authorities hoist a flag above the lifeguard tower that depicts an interdictory circle containing a swimmer mid-stroke.

The interdictory circle outside City Hall functions the same way. At trial, all witnesses agreed that an interdictory circle has a conventional meaning ("No _____.") and that this meaning is supplied in the absence of certain words ("No _____."). FRUTIGER, *supra*, at 349–50. Here that meaning most naturally "refers" or "alludes" to possession of a handgun and all that goes along with it—like the rules that govern when and where a license holder may possess one. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1907 (2002) (defining "refer" as "to direct attention: ALLUDE"). To be sure, the symbol may simultaneously refer to other things. At trial, the City insisted the symbol refers to possession of *all weapons*. 2CR.173-74. But that does not mean it no longer refers to the rules for possessing handguns. The City's interpretation amounts to saying: "I'm not referring to squares; I'm referring to rectangles." But the greater includes the lesser.

The trial court erred by accepting the City's contrary view. It seemed to think that express reference for purposes of § 411.209(a) requires a written *statement* using the words "Section 30.06" or "handgun license." *See* CR.377. By the trial court's reasoning, then, the interdictory circle does not "expressly refer[]" to anything at all. But that ignores the plain meaning of a "sign," which is a mark often "used in place of words." It is therefore hard to imagine how any symbol could qualify under the trial court's reading: A symbol without a written statement would not "expressly refer" to anything; but a symbol accompanied by a written statement might no longer be a "sign."

Taking the trial court's reading of both provisions together, a separate problem confirms the infirmity of its interpretation. It says a "communication" must contain the exact language provided in § 30.06(c)(3)(A), and a "sign" must explicitly state something about § 30.06 or a handgun license. CR.379. If that is right, then the type of communication the trial court imagines will *always* "expressly refer[] to" § 30.06 or handguns. One of the two terms—"communication" or "sign"—is doing no work. That fails to "interpret the statute in a way that gives meaning to all its words." *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 492 (Tex. 2017) (applying rule against surplusage).

* * *

S.B. 273 sought to provide license holders clarity and ensure they did not have to choose between exercising their right to carry firearms and their right to access government buildings. But the City has prevented them from exercising the rights Texas law affords them. At trial, the City suggested that its security officers would

not actually arrest a license holder who did not succumb to "verbal persuasion." 2RR.175-77, 182-86. But that suggestion is belied by the City's own admissions. In a press release, the City stated: "It is *a criminal offense* under Texas State Law to possess or carry a weapon, including a handgun carried by a person licensed to carry it" in City Hall. 4RR, P. Exs. 83, 84 (emphasis added). License holders should not be put to the choice of forcing the City's hand by ignoring the interdictory circle and suffering the consequences or foregoing the exercise of their right to carry a handgun. That was the whole point of S.B.273.

B. A municipality may not ban access to an entire building where only a portion of that building is being used as the "premises" of a government court.

The trial court also misunderstood *where* the City may lawfully prohibit handguns. Section 411.209(a) says that a municipality may not inform a license holder that handguns are prohibited "unless license holders are prohibited from carrying a handgun on the premises or other place by Section 46.03 or 46.035, Penal Code." Section 46.03(a)(3) makes it unlawful to possess a handgun "on the premises of any government court or offices utilized by the court." And "premises" is defined as "a building or a portion of a building." *See* Tex. Penal Code §§ 46.03(c)(1), 46.035(f)(3).

The most natural reading of these provisions is that a license holder is prohibited from carrying a handgun in an entire building being used as a court and in all its component parts—not that he is prohibited from carrying a handgun in a building in which a court is a component part. The key word is a little one: "of." Here that

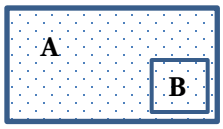
preposition expresses the relationship between a general class of a thing ("premises") and a specified thing which belongs to that class ("government court"). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1565 (2002) (defining "of" as "a function word [used] to indicate a particular example belonging to the class denoted by the preceding noun"); *cf.* SIDNEY GREENBAUM, THE OXFORD ENGLISH GRAMMAR 4.12 (1996) ("home *of the couple*" means "*the couple's* home"). In other words, "of" helps "government court" limit the universe of "premises" at issue. Because the statute refers only to the premises *of a government court*, we know it is not concerned with the premises *of a French restaurant* or the premises *of a public library*.

The trial court read the statute to do something very different—and which the normal rules of English grammar do not allow. First, it read § 46.035(f)(3)'s gloss on "premises" into § 46.03(a)(3). In doing so, it reimagined the combined provision to read this way: It is unlawful to possess a handgun "[in] [a building or a portion of a building] of any government court or offices utilized by the court."[3] CR 384. Simply because "or" indicates a disjunctive phrase, the court concluded that a municipality may ban guns from an entire building—regardless of whether the whole building or only a portion of it is being used as a government court. *Ibid.* Essentially it read "government court" to *expand* "building" and "portion of a building."

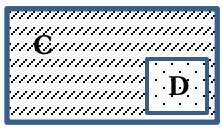
[3] It is worth noting the trial court had to change more words than just "premises" for its reconfigured statute to make any sense. Swapping the gloss one-for-one without additional edits yields this: It is unlawful to possess a handgun "on the [building or a portion of a building] of any government court or offices utilized by the court." That strange syntax is a sure signal that something is wrong.

But reading § 46.035(f)(3) and § 46.03(a)(3) *in pari materia* may not—and does not—change the function of the preposition "of." SCALIA & GARNER, *supra*, at 140 ("Words are to be given the meaning that proper grammar and usage would assign them."). "Government court" (the specified thing) *constrains* "building" and "portion of a building" (the general category). Handguns are barred from the building of a government court—that is, from a government court building, as distinguished from a public library building. And "a government court building" is what most people would call a courthouse actively being used solely by a court. Handguns are also barred from the portion of a building of a government court—that is, from a government court's portion of a building, as distinguished from a French restaurant's portion of a building. And "a government court's portion of a building" is what most people would call a courtroom, or a jury room, or the clerk's office.

A picture illustrates the point. Imagine that **A** is an entire building being used as a government court and **B** is a portion of that building:



Texas law prohibits a license holder from carrying a handgun in both places. Now, imagine that **C** is a building being used to host the Mayor's office, the tax department, and various other offices. **D** is a portion of that building hosting a court:



Texas law may prohibit a license holder from **D**, but not from **C**. Visitors like Michael Cargill are permitted in City Hall (**C**), even on days when a government court is meeting in a different part of that building (**D**).

As an added benefit, this interpretation comports with the whole-text canon. SCALIA & GARNER, *supra*, at 168. Courts must construe neighboring provisions of statutes together. And a neighboring provision provides a helpful indicator of meaning here. Section 46.035(c) makes it unlawful to possess a handgun in a government meeting subject to the Texas Open Meetings Act. But it applies only to the "room or rooms where a meeting of a government entity is held." Tex. Penal Code § 46.035(c); *see also* Tex. Att'y Gen. Op. KP-0047, 2015 WL 9434993, at *4 (Dec. 21, 2015). It does not permit a municipality to ban guns throughout an entire building when a government meeting is held in a single room inside that building.

It is surpassing strange to construe § 46.03(a)(3) to do the exact opposite by ignoring basic rules of English grammar and neighboring statutory provisions. Suppose the City rented space in a 75-story government office building while its courthouse was under construction. In the trial court's view, the entire skyscraper would be the "premises of a government court." Section 46.03(a)(3) rejected that view, and accomplished the same thing as § 46.035(c), by using a prepositional phrase.

* * *

Important consequences flow from a proper reading of the statute. If the trial court had properly concluded that the interdictory circle qualified as a "communication" or a "sign," then no one could disagree that the City has engaged in covered conduct for more than two years. The interdictory circle is depicted on the glass

doors at the entrance to City Hall *to this day*. And if the trial court had properly concluded that a municipality may ban guns only from that portion of the building being used as a court, the City could not provide a blanket ban—written or oral—at the building's entrance. The interdictory circle, x-ray machine, magnetometer, and security officers would all need to communicate their message ("No possession of a handgun") only as to the room hosting Community Court ("in this courtroom") and only on those days when the court is in session ("on this day").

II. The Trial Court Erred in Calculating Civil Penalties Because It Undercounted the Number of Total Violations and Assigned the Wrong Amount for Subsequent Violations.

In addition to misconstruing S.B. 273's substantive scope, the trial court also erred in construing the law's penalty provisions. Based solely on the 6 oral communications that the trial court found violated S.B. 273, it should also have found continuing, daily violations—at least 577 of them over a period spanning more than two years. It failed to do so only by applying the wrong legal standard for showing a "continuing violation." Tex. Gov't Code § 411.209(c). But even as to the 6 violations the trial court found, it got the math wrong. The court should have imposed the increased penalties that S.B. 273 requires for any "subsequent" violation, after the interdictory circle was first affixed to the building's entrance or security officers first orally communicated the City's handgun ban. *Id.* § 411.209(b)(1)-(b)(2). This Court reviews both of those statutory questions *de novo*. *Tex. Gen. Indem. Co. v. Tex. Workers' Compensation Comm'n*, 36 S.W.3d 635, 640 (Tex. App.—Austin 2000, no pet.).

A. The Legislature has the authority to impose cumulative penalties for continuing violations of state law—and it exercised that authority here.

"[P]rescribing fines is a matter within the discretion of the legislature." *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980). That means the Texas Legislature may impose cumulative penalties for cumulative violations. Courts police statutory text carefully to determine whether a given statute requires cumulative penalties, but "the real question is simply what the statute means." *Missouri, K. & T. Ry. Co. of Tex. v. United States*, 231 U.S. 112, 119 (1913). Where, as here, the statutory text is clear, courts must enforce the cumulative scheme the legislature has chosen—even when the resulting fines are "not insubstantial." *State v. Morello*, 547 S.W.3d 881, 889 (Tex. 2018); *accord Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004) (noting the legislature may "impose a fine far beyond the damages" suffered).

Countless statutes demonstrate the Legislature's willingness to exercise that authority. Some schemes key cumulative penalties to each *instance* of violative conduct. *See, e.g.*, *Texarkana & Ft. S. Ry. Co. v. Sabine Tram Co.*, 129 S.W. 198, 199 (Tex. Civ. App. 1910), *aff'd*, 143 S.W. 143 (Tex. 1912). Others key penalties to each *day* of violative conduct. *See also Brown*, 156 S.W.3d at 564 n.23 (collecting statutes). Still others do both. *See* Tex. Health & Safety Code § 247.045(a), (c); Tex. Water Code §§ 7.102, 7.103. Some permit the same penalty for all violations. *See, e.g.*, Tex. Spec. Dists. Code §§ 8801.204(a)(2)(A), 8888.170(a); Tex. Transp. Code §§ 391.126(b), 391.254(a); Tex. Nat. Res. Code § 91.260; Tex. Bus. & Com. Code § 109.006(a). Others increase the amount of the penalty for subsequent violations. *See, e.g.*, Tex.

Gov't Code § 752.056; Tex. Loc. Gov't Code § 232.035(c), 232.079(b); Tex. Lab. Code § 213.024(a).

The legislature exercised that authority here to combat municipalities' known contumacy by creating stiff incentives to compliance. S.B. 273 permits the Attorney General to recover civil penalties for a violation of the law. Tex. Gov't Code § 411.209(b). And "each day" the municipality continues to violate the statute "constitutes a separate violation." *Id.* § 411.209(c). On top of that, the statute immediately ups the ante: On day two, the amount of the fine grows by a factor of ten and remains there indefinitely. The penalty for the first violation must be between $1,000 and $1,500. *Id.* § 411.209(b)(1). But the penalty for every "subsequent" violation must be between $10,000 and $10,500. *Id.* § 411.209(b)(2). Thus, S.B. 273 imposes a cumulative scheme that keys penalties to the days of violation and increases the amount of penalties for those successive days of violative conduct.

B. The City is liable for civil penalties during the entire period that it refused to comply with the statute.

At trial, the Attorney General introduced evidence that the City has for years maintained a policy prohibiting license holders from entering City Hall with a handgun at all times. Witnesses testified that the City enforced that policy "every time [City Hall is] open, 24/7" through both visual and oral communications to anyone entering the building. 2RR.142. And evidence confirmed that the City used those communications continuously from July 25, 2016, through January 4, 2019—even though a "government court" met during business hours, at most, 12 days per year. Thus, over a period of 611 days (excluding weekends and holidays), the City could

point to an exception that justified the policy for only 34 days. The City therefore violated the statute 577 different times.

The trial court, however, imposed civil penalties for only 6 discrete violations occurring on: April 4, 2016; April 6, 2016; April 12, 2016; July 1, 2016; July 29, 2016; and September 7, 2016. CR.2685. It concluded that the Attorney General "did not meet its burden to establish a violation on any other date." *Ibid.* The only way to understand the trial court's order is that it required the Attorney General to provide independent testimony of the City's conduct on 577 discrete days, which would require sending an individual to City Hall every day for nearly three years.

That approach conflicts with longstanding Supreme Court precedent. "[S]o long as [violative acts] continue at all, it cannot be held that there has been compliance with the law." *San Antonio & A.P. Ry. Co. v. State*, 14 S.W. 1063, 1065 (Tex. 1891). Accordingly, where a plaintiff has introduced evidence of a continuing course of violative acts that have not abated, Texas courts *presume* a continuing violation absent evidence to the contrary. *See Slay v. Tex. Comm'n on Envtl. Quality*, 351 S.W.3d 532, 551 (Tex. App.—Austin 2011, pet. denied); *Jonnet v. State*, 877 S.W.2d 520, 524 (Tex. App.—Austin 1994, writ denied).

The proceedings in *State v. Harrington*, 407 S.W.2d 467 (Tex. 1966), are instructive. There the State sought daily penalties from defendants for illegally operating a deviated well. *Harrington v. State*, 385 S.W.2d 411, 416 (Tex. App.—Austin 1964). On appeal, this Court permitted penalties for only a discrete number of days supported by direct evidence of operation. Although the State had introduced evidence of the well's daily and monthly production capability over a ten-year period, this

Court refused to apply an "inference" or "presumption" of continuous violations and concluded the defendants shouldered no burden to show that they were *not* in violation. *Id.* at 422-23. Accordingly, this Court held the State's evidence did not suffice to show the well had been unlawfully operating on 3,650 different days. *Ibid.*

The Supreme Court of Texas reversed. It concluded that the State *had* "discharged its burden" of proving 3,650 days' worth of penalties. *Harrington*, 407 S.W.2d at 473. Where this Court refused to apply a presumption, the Supreme Court did the opposite: It presumed that "the well was being operated and maintained so as to attain the result appropriate to the nature of the enterprise." *Id.* at 479. And it recognized that the defendants had the burden to rebut the inference that the State's evidence created. *See id.* at 473 (noting defendants "offered no direct evidence" controverting the State's evidence), 478 (same).

The Supreme Court took the same approach in *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800 (Tex. 1979). There the State sued an offal plant operator—converting chicken and turkey parts into dog food—for violating several state statutes. *Tex. Pet Foods, Inc. v. State*, 578 S.W.2d 814, 816 (Tex. App.—Waco 1979). At trial, the jury imposed civil penalties on the operator for using one of its cookers without an operating permit from April 11, 1975, to August 2, 1976. *Id.* at 818. On appeal, the operator objected that the State had introduced affirmative evidence only as to "*three days* during the time in question." *Ibid.* (emphasis added). The Court of Appeals disagreed. Trial evidence showed that the defendant usually operated the plant Monday through Friday, from 4:00 PM on. *Id.* at 822. That sufficed to show the operator was continuously using the non-compliant cooker during regular business hours. *Ibid.*

The Supreme Court affirmed, even though the operator continued to insist "there is no evidence that the sixth cooker operated more than three separate days." *Texas Pet Foods, Inc.*, 591 S.W.2d at 805. The trial evidence permitted an assumption that the cooker was operating on a daily basis "*even when it was not actually producing* a product by means of a cooking cycle." *Ibid.* (emphasis added).

But the Supreme Court went one step further. Although the Court of Appeals awarded civil penalties for continuous operation of the cooker, it refused to award the State an injunction against further operation without a license. *Tex. Pet Foods, Inc.*, 578 S.W.2d at 821-22. The Supreme Court reversed. The same evidence of regular business activities, and the inferences that evidence supported, *also* justified equitable relief: Where evidence suggests a defendant is engaging in continuing violations, a trial court may "determine that the defendant has engaged in a settled course of conduct" and "assume that it will continue, absent clear proof to the contrary." *Texas Pet Foods, Inc.*, 591 S.W.2d at 804. Evidence on 3 days out of 478 sufficed. *Ibid.*

In this case, the Attorney General supplied uncontroverted evidence of a continuing violation in the form of a permanent interdictory circle and repeated oral pronouncements by security officers pursuant to script from which they could not deviate. At that point, under *Harrington* and *Texas Pet Foods*, the burden shifted to the City to demonstrate that it had a lawful excuse for barring handguns, or that it had ceased to enforce its unlawful policy. *See* 41 TEX. JUR. 3D *Forfeitures & Penalties* § 40 (2019) ("The defendant has the burden of alleging facts constituting a legal excuse for failure to comply with the relevant statue."); *Tri-County Farmer's Co-op v. Bendele*, 641 S.W.2d 208, 209-10 (Tex. 1982) (per curiam).

The City did introduce evidence of programs that it *thought* supplied an excuse for additional days—like the location of the city prosecutor's office inside City Hall and summer internship programs for high school students. 3RR.36-43. But the trial court rejected those excuses as a legal matter when it concluded that "Defendants did not meet their burden to establish an exception to Section 411.209 on [the six] dates listed above." CR.2685. The only excuse the trial court accepted was the presence of a government court, and the only courts that qualified were Teen Court and Community Court. The former met after hours, and the latter met once a month. Over a 611-day period, then, the City rebutted the natural inference of the Attorney General's evidence for only 34 days. *See supra* at 28-29.

That adds up to serious liability under the Legislature's remedial scheme. Because "[e]ach day of a continuing violation . . . constitutes a separate violation," the City violated the statute 577 different times. Tex. Gov't Code § 411.209(c). Under the statue, "the first violation" incurs a minimum penalty of $1,000 (1 × 1,000) and all "subsequent violation[s]" incur a minimum penalty of $10,000 (576 × 10,000). *Id.* § 411.209(b)(1)-(b)(2). Under the plain text of the statute, the City is liable for $5,761,000. Though hefty, "[t]he amount of the civil penalty is the result of [the City's] own conduct in failing to comply" with the law. *Polsky v. State*, No. 03-14-00068-CV, 2016 WL 2907975, at *9 (Tex. App.—Austin May 13, 2016), *aff'd*, 2016 WL 2907975 (Tex. May 13, 2016).

C. At the very least, the City is liable for enhanced civil penalties of $10,000 each for the subsequent violations the trial court found.

Even assuming the trial court was correct to require the State to produce independent evidence to support each and every violation (and it was not), the trial court *still* erred in calculating civil penalties. If the City is found liable for only 6 violations—even though it is liable for nearly 600—5 of those violations should have incurred enhanced penalties under the statute's plain text.

As explained above, the Legislature designed § 411.209 to address known municipal intransigence when it comes to respecting a law-abiding citizen's right to carry a concealed handgun. To that end, the Legislature deliberately wrote the statute to increase the amount of the penalty *tenfold* for subsequent violations. For the first violation, a court must impose a penalty of "not less than $1,000." Tex. Gov't Code § 411.209(b)(1). But for "the second or a subsequent" violation, the court must impose a penalty of "not less than $10,000." *Id.* § 411.209(b)(2). That text applies to the violations here in a straightforward way: The first violation occurred on April 4, 2016; the second violation occurred on April 6, 2016; and the remaining violations, which occurred on April 12, 2016, July 1, 2016, July 29, 2016, and September 7, 2016, were all "subsequent" violations. *See Jonnet*, 877 S.W.2d at 524. At a minimum, then, the trial court should have imposed $51,000 in penalties.

The trial court, however, simply imposed "a civil penalty of $1,500.00, for each violation, and a total of $9,000.00 for all violations." CR.2686. That was a mistake. Under the unambiguous terms of the statute, "the trial court did not have the discretion to assess a civil penalty in an amount less than the [$10,000] daily minimum

penalty." *Polsky*, 2016 WL 2907975, at *9; *see also State v. City of Greenville*, 726 S.W.2d 162, 167-70 (Tex. App.—Dallas 1986, writ ref'd).

III. The Trial Court Must Reassess Attorney's Fees Considering the Proper Calculation of Civil Penalties.

A trial court must award reasonable attorney's fees when the Attorney General succeeds in securing civil penalties. Tex. Gov't Code § 411.209(g); *cf. Tex. Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 854 (Tex. App.—Austin 2002, pet. denied). This Court reviews a trial court's determination of what amount is reasonable for an abuse of discretion. *La Ventana Ranch Owners' Ass'n, Inc. v. Davis*, 363 S.W.3d 632, 647-48 (Tex. App.—Austin 2011, pet. denied).

But in exercising its discretion to set fees, a trial court must consider "the amount involved and the results obtained." *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997); *see also id.* at 819 (keying fee award to "the total amount of the judgment"). When an appellate court changes those results on appeal, then it must also vacate and remand for the trial court to reassess attorney's fees. *Young v. Qualls*, 223 S.W.3d 312, 314-15 (Tex. 2007) (per curiam).

Here the trial court imposed $9,000 in civil penalties. CR.2686, 2935. Based on that result, the court awarded $25,000 in attorney's fees. CR.2917-18. But as already explained above, the City is liable for more than $5,000,000 in penalties. *See supra* part II.B. (At the very least, it is liable for $51,000. *See supra* part II.C.) Recognizing "the total amount of the judgment" fundamentally alters the fees calculus. *Arthur Andersen & Co.*, 945 S.W.2d at 819. This Court should therefore vacate the trial

court's fee award and remand for reconsideration in light of the revised judgment—just as it has done before. *See La Ventana*, 363 S.W.3d at 651-52.

Prayer

The Court should reverse the trial court's partial grant of the City's plea to the jurisdiction. It should also reverse and render judgment imposing civil penalties not less than $5,761,000. Alternatively, it should reverse and render judgment imposing civil penalties not less than $51,000. In either case, the Court should vacate the trial court's fee award and remand for reconsideration in light of the proper penalty.

Respectfully submitted.

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Certificate of Service

On December 9, 2019, this document was served electronically on Sameer Birring, lead counsel for appellees, via sameer.birring@austintexas.gov.

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Certificate of Compliance

Microsoft Word reports that this brief contains 9,701 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Trevor W. Ezell
Trevor W. Ezell

No. 03-19-00501-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

KEN PAXTON, ATTORNEY GENERAL,
Plaintiff-Appellant,

v.

CITY OF AUSTIN; MAYOR STEVE ADLER; ORA HOUSTON; DELIA GARZA; SABINO RENTERIA; GREGORIO CASAR; ANN KITCHEN; DON ZIMMERMAN; LESLIE POOL; ELLEN TROXCLAIR; KATHIE TOVO; AND SHERI GALLO, EACH IN THEIR OFFICIAL CAPACITY,
Defendants-Appellees.

On Appeal from the
53rd Judicial District Court, Travis County

APPENDIX TO PLAINTIFF-APPELLANT'S BRIEF

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Item

A:

December 22, 2017, Letter Granting Defendant's Plea to the Jurisdiction in Part (CR.372-87)

261ST DISTRICT COURT

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December 22, 2017

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Re: Cause No. D-1-GN-16-003340; *Paxton v. City of Austin, et al.;* In the 53rd District Court of Travis County, Texas

Dear Counsel:

I have considered the pleadings, the pleas, the motion, responses, replies, evidence and the arguments of counsel and have signed the enclosed order. Additionally, the Court provides this letter as the basis for the Court's order.

I. BACKGROUND

The central question presented to the Court is whether the City of Austin improperly gave notice that handguns were prohibited from City Hall in violation of Texas Government Code Section 411.209. There is evidence to support the following timeline that gives rise to the present dispute:

1. Initial Complaint

- September 1, 2015 – Senate Bill 473 became effective as Texas Government Code § 411.209, creating a civil penalty for political subdivisions who improperly provide notice that license holders are prohibited from entering the government premises.

- September 1, 2015 – A private citizen sends a letter to Austin Mayor Steve Adler that the City Hall is in violation of Section 411.209 because a Texas Penal Code Section 30.06 notice is displayed at the security checkpoint at the entrance of Austin's City Hall.

- September 2, 2015 – The private citizen sends a complaint to the Office of the Attorney General ("OAG") pursuant to Section 411.209(d) regarding the Section 30.06 notice displayed at City Hall.

- September 30, 2015 – The private citizen sent a letter to Captain Greg Lucas at the OAG. The letter states that City Hall has removed the Section 30.06 notice and is refusing license holders from carrying a handgun pursuant to an exception to Texas Government Code Section 411.209(a) and Texas Penal Code 46.03(a)(3).

- From the record before the Court, it appears that the OAG took no further action on this citizen complaint.

2. Second Complaint and Investigation

- April 4, 2016 – The private citizen sent another letter to Mayor Adler to inform him that City Hall was "in violation of Texas Penal Code §30.06(e) and is actionable under Texas Government Code § 411.209." The citizen demanded that the City immediately cease and desist.

- April 6, 2016 – The private citizen sent a new complaint to the OAG, complaining that City Hall prohibited handguns through verbal communication in violation of Texas Government Code Section 411.209.

- April 22, 2016 – The OAG sent a letter to Mayor Adler that it was reviewing the complaint it received and would inform the Mayor of its decision.

- June 16, 2016 – The City's Law Department responded that the City was not in violation of Section 411.209 because City Hall meets the exception for government courts described in Texas Penal Code Section 43.06(a)(3) (the "courthouse exception").

- July 1, 2016 – Capt. Lucas went to City Hall. At the security checkpoint, he asked whether he was allowed to carry a handgun if he were licensed to carry. The security guard told

him that handguns were not allowed and that the City considered City Hall to be a courthouse. Capt. Lucas stated that he examined the first floor and found no evidence of a court or courtroom on the first floor. He also observed a symbol etched into the glass doors to City Hall. The symbol is a handgun surrounded by a circle with a line through it (the "gun prohibition symbol"). There is no allegation, in the record before the Court, that the security guards referenced Texas Penal Code Section 30.06.

- July 5, 2016 – The OAG sent a letter to Mayor Adler that the OAG had determined, after investigation, that the City of Austin was in violation of Texas Government Code § 411.209. In it, the OAG recognized that the City had alleged that City Hall was excepted from Section 411.209 under the courthouse exception. The OAG stated that it was unable to determine that City Hall meets the statutory definition of "government court or offices utilized by the court" and that the City may only limit handguns under the courthouse exception for the portions of the building that fit the definition.

- July 29, 2016 – Capt. Lucas returned to City Hall. Again, the security guard told him that handguns were not allowed because the City considers the building to be a courthouse. The security guard also told him that juvenile court is held at City Hall once a week. While there, Capt. Lucas asked a security guard and clerk's office employee for a directory. Neither had a building directory but informed him that the City Clerk's Office is on the first floor, the Mayor's Office and City Council Offices are on the second floor, the City Manager's Office is on the third floor, and the City of Austin legal offices are on the fourth floor. Capt. Lucas noted that neither mentioned a courtroom. He observed the gun prohibition symbol on the glass doors again. There is no allegation, in the record before the Court, that the security guards referenced Texas Penal Code Section 30.06.

- August 12, 2016 – Capt. Lucas returned to City Hall. On this trip, he observed the gun prohibition symbol and observed the security station, noting that no significant changes had been made.

- September 7, 2016 – Capt. Lucas and Lieutenant Tim Ferguson, also an investigator with the OAG, went to City Hall. Both have licenses to carry and were carrying handguns when they arrived at City Hall. Neither identified themselves as law enforcement officers or investigators for the OAG. Capt. Lucas took a picture of the gun prohibition symbol. The investigators recorded their interactions with the security guards. The security guards refused

to allow Lt. Ferguson beyond the security checkpoint with a handgun. The security guards told Lt. Ferguson and Capt. Lucas that City Hal was designated as a courthouse, and provided the investigators with a statement that, in part, states "'WEAPONS ARE NOT ALLOWED IN CITY HALL BECAUSE IT IS DESIGNATED AS A COURT FACILITY' REPEAT IF NECESSARY, DO NOT ADD OR OMIT ANY VERBIAGE FROM THE STATEMENT ABOVE!!" Multiple security guards reiterated the statement that Lt. Ferguson and Capt. Lucas were prohibited from entering City Hall with a handgun. When asked about courts and courtrooms, a person associated with the security guards stated that he was enforcing the policy and that the investigators should discuss any issues with the legal department. The security guards refused admittance of Lt. Ferguson and stated he was prohibited from entering the building with a handgun. The security guards knew that Lt. Ferguson had a license to carry a handgun and expressly referenced Lt. Ferguson's concealed handgun license. There is no allegation that the security guards referenced Texas Penal Code Section 30.06.

- March 2, 2017 – The OAG sent a letter to Interim City Manager Elaine Hart, enclosing the July 5, 2016, letter that it had sent to Mayor Adler.

3. Procedural History

- July 27, 2016 – The OAG filed a petition against the City of Austin, the Mayor, and its City Council. In it, it alleges that Defendants violated Section 411.209 by prohibiting people with licenses to carry handguns from carrying handguns into City Hall. The lawsuit seeks civil penalties for the alleged violation and a writ of mandamus preventing the City from continued violations of Section 411.209.

- August 22, 2016 – Defendants filed their Plea to the Jurisdiction alleging that the pleadings of the OAG were not enough to trigger Section 409.209's waiver of sovereign immunity.

- September 9, 2016 – The OAG filed an amended petition addressing Defendants' Plea and alleging that the oral communications prohibiting a person from entering City Hall expressly referenced the citizen's license to carry a handgun.

- November 10, 2016 – The OAG filed its motion for summary judgment on all issues including a writ of mandamus, civil penalties, and award costs and attorney's fees.

- February 10, 2017 – Defendants filed their second Plea to the Jurisdiction, responding to the OAG's amended petition.

- August 31, 2017 – The Court heard arguments from the parties on (1) the OAG's motion for summary judgment and (2) Defendants' Plea to the Jurisdiction to the OAG's Amended Petition.

II. STATUTORY AND LEGAL STANDARD

This case focuses on the construction and application of Texas Government Code Section 411.209(a), which in relevant part states:

> A state agency or a political subdivision of the state may not provide notice by a communication described by Section 30.06, Penal Code, or by any sign expressly referring to that law or to a concealed handgun license, that a license holder carrying a handgun under the authority of this subchapter is prohibited from entering or remaining on a premises or other place owned or leased by the governmental entity unless license holders are prohibited from carrying a handgun on the premises or other place by Section 46.03 or 46.035, Penal Code.

Tex. Gov't Code Section 411.209(a).[1] By its language, Section 411.209 is limited to only particular types of notices that tell a license holder that he or she may not enter with a handgun: (1) a Section 30.06 communication and (2) a sign expressly referring to Section 30.06 or a

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[1] During the 85th Legislative Session, the Legislature amended Section 411.209(a), which became effective on September 1, 2017:

> Except as provided by Subsection (i), a state agency or a political subdivision of the state may not provide notice by a communication described by Section 30.06, Penal Code, or by any sign expressly referring to that law or to a license to carry a handgun, that a license holder carrying a handgun under the authority of this subchapter is prohibited from entering or remaining on a premises or other place owned or leased by the governmental entity unless license holders are prohibited from carrying a handgun on the premises or other place by Section 46.03 or 46.035, Penal Code.

Act of June 15, 2017, 85th Leg., R.S. ch. 1143, 2017 Tex. Sess. Law Serv. Ch. 1143 (H.B. 435).

No party at the hearing argued that the amendments affected the State's claim for prospective relief by writ of mandamus. For convenience, references to Section 411.209 in this Order will refer to the pre-September 1, 2017, version of the statute.

"concealed handgun license." Additionally, it is not a violation of Section 411.209(a) if license holders are otherwise prohibited by Texas Penal Code Section 46.03 or 46.035.

For a "communication described by Section 30.06, Penal Code," the statute incorporates the communications referenced or defined in Texas Penal Code Section 30.06, which states: "For purposes of this section, a person receives notice if the owner of the property or someone with apparent authority to act for the owner provides notice to the person by oral or written communication." Tex. Penal Code § 30.06(b).[2] "Written communication" is a defined term in Section 30.06, requiring—among other things—language identical to "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun." *Id.* § 30.06(c)(3). "Oral communication" is not defined in the statute. *See id.* § 30.06. At least one Court of Appeals Justice has reasoned that "oral communication" under Section 30.06 must include a express reference to Section 30.06—the statute imposing criminal liability. *Tafel v. State*, 524 S.W.3d 642, 671 (Tex. App.—Waco 2016, pet. denied) (Gray, C.J., dissenting) ("This brings home the need to reference section 30.06 in the oral communication—it informs the recipient of the basis for being excluded from the property whether it is an oral communication or a written sign."); *see* Tex. Penal Code § 30.06.

As for "any sign expressly referring to that law or to a concealed handgun license," Section 411.209 does not define "sign" and, therefore, the Court looks to the plain and ordinary meaning. Tex. Gov't Code § 411.209(a).

Pursuant to Section 411.209, a political subdivision may provide notice prohibiting a license holder from entering or remaining with a handgun if "license holders are prohibited from carrying a handgun on the premises or other place by Section 46.03 or 46.035, Penal Code." *Id.* Relevant to this case, Texas Penal Code Sections 46.03 or 46.035 create criminal liability for persons bringing handguns[3] on to certain types of property including:

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[2] Like Texas Government Code Section 411.209, Section 30.06 was amended, taking effect September 1, 2017. Act of June 15, 2017, 85th Leg., R.S. ch. 1143, 2017 Tex. Sess. Law Serv. Ch. 1143 (H.B. 435). No party at the hearing argued that the amendments affected the State's claim for prospective relief by writ of mandamus. For convenience, references to Section 30.06 in this Order will refer to the pre-September 1, 2017, version of the statute.

[3] Section 46.03 includes other weapons beyond handguns, but for purposes of this case, it is relevant that handguns even if possessed by license holders may be prohibited.

- "on the premises of any government court or offices utilized by the court" (Texas Penal Code Section 460.03(a)(3)) (the "courthouse exception");
- "on . . . any grounds or building on which an activity sponsored by a school or educational institution is being conducted . . ." (Texas Penal Code § 46.03(a)(1)) (the "school-sponsored activity exception"); and
- "in the room or rooms where a meeting of a governmental entity is held and if the meeting is an open meeting subject to Chapter 551, Government Code, and the entity provided notice as required by that chapter" (Texas Penal Code § 46.035(c)) (the "open meetings exception").

"Premises" is defined as "a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area." Tex. Penal Code §§ 46.03(c)(2); 46.035(f)(3).

Texas Government Code Section 411.209 also requires the OAG to send written notice to the political subdivision's chief administrative officer and provide an opportunity to cure prior to bringing suit. Tex. Gov't Code § 411.209(f)–(g).

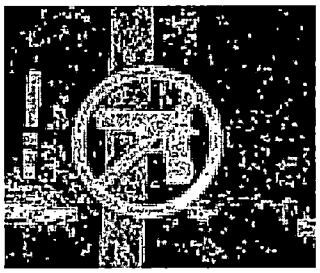
III. ANALYSIS

A. Did the City Provide the Required Notices Under Section 411.209?

The OAG complains of two potential "notices" from the City upon entering City Hall: (1) the gun prohibition symbol and (2) the oral prohibition from city security officers.

1. The Gun Prohibition Symbol

The OAG has presented evidence that etched on the doors to City Door is a gun prohibition symbol—a gun with a circle around it and a line through it:



The OAG alleges that this symbol violates Section 411.209 as a notice that prohibits license holders from entering City Hall. However, the gun prohibition symbols fails to meet the requirements of a notice of Section 411.209.

a. Communication Described by Section 30.06

A 30.06 communication may be written communication or oral communication. The gun prohibition symbol is not oral communication and, therefore, would need to meet the definition of written communication. To constitute written communication, the symbol would need to include the following identical language: "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun." Tex. Penal Code § 30.06(c)(3).

The gun prohibition symbol does not include this language, is not written communication as defined by Section 30.06 and, therefore, cannot be "notice by a communication described by Section 30.06, Penal Code" pursuant to Section 411.209.

b. Any sign expressly referring to Section 30.06 or to a concealed handgun license

If the symbol is not a communication described by Section 30.06, it must expressly reference Section 30.06 or to a concealed handgun license. *See* Tex. Gov't Code § 411.209(a). In the case of the gun prohibition symbol, it is a sign; however, it neither references Section 30.06 nor a concealed handgun license. Therefore, the gun prohibition symbol cannot be "notice . . . by any sign expressly referring to [Section 30.06, Penal Code,] or to a concealed handgun license." *See id.*

Because the gun prohibition symbol does not meet the type of notices required, it does not constitute a violation of Section 411.209. Therefore, the City's Plea to the Jurisdiction as to the

OAG's claims that gun prohibition symbol violates Section 411.209(a) should be and is granted and the OAG's motion for summary judgment as to these claims is denied as moot.

2. The Oral Prohibitions

The OAG also claims that oral statements made to investigators by the City Hall security officers violate Section 411.209. There is some evidence that, on three separate occasions, OAG investigators approached the security checkpoint at City Hall and were told variations of the same oral prohibition:

- "Weapons are not allowed in City Hall because it's designated as a Court Facility."[4]
- "You cannot bring a pistol in here because this is used as a courthouse, okay? Only Peace Officers and Security Personnel."
- "Yeah, we're not allowed to have any handguns because we are an extent [sic] of the courthouse."
- "The security guard responded that I could not [carry a handgun in Austin City Hall] and explained that the City of Austin considers the building a courthouse."
- "The security guard simply repeated his explanation that Austin City Hall is a courthouse."
- "I asked the security guard whether I could carry a handgun in Austin City Hall if I were licensed to carry a handgun in Texas. The security guard responded in the negative. . . . The security guard explained that the City of Austin considers the building a courthouse."

The OAG alleges that the security guards' oral statements to the investigators qualify as one of the types of notices required by Section 411.209.

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[4] This statement was made in accordance with a written statement, which was handed to the investigators, for the security guards to refer to. It is unclear whether the OAG is arguing that this is a separate violation above and beyond the oral statements. However, as with the gun prohibition symbol, it neither contains the language required for a written communication under Section 30.06 nor does it expressly reference Section 30.06 or concealed handgun licenses. Therefore, it is not a violation.

a. Any sign expressly referring to Section 30.06 or to a concealed handgun license

The Court will begin with the second type of notice described in Section 411.209 as it is easily disposed. Given that Section 411.209 does not define "sign," the Court should apply its plain and ordinary meaning. In the context of the statute, the plain and ordinary meaning of "sign" would require a written or tangible display or posting. This definition is reinforced by Texas Penal Code Section 30.06's—referenced in Section 411.209—use of sign as part of the definition of "written communication," which means "a sign posted on the property . . . ."

Because the oral statements by the security guard are not signs under the plain and ordinary meaning, the oral statements are not "notice . . . by any sign expressly referring to [Section 30.06, Penal Code,] or to a concealed handgun license."

b. Communication Described by Section 30.06

For a statement to be a violation of Section 411.209, it must be an oral communication described by Section 30.06. *See* Tex. Gov't Code § 411.209(a); Tex. Penal Code § 30.06. "Oral communication" is not defined in the statute. *See* Tex. Penal Code § 30.06. The plain and ordinary meaning of "oral communication"—e.g., spoken interchange of information—provides little insight as to whether the statement is sufficient under Section 30.06.

Apparently, the OAG has concluded that any communication prohibiting handguns is a violation of Section 411.209:

> A court would likely conclude that section 411.209 of the Government Code can be implicated by a governmental entity that seeks to improperly prohibit handguns from a place where handguns may be lawfully carried through oral notice or by a written notice that does not conform to section 30.06 of the Penal Code.

Tex. Att'y Gen. Op. No. KP-0049 (2015).

However, often the plain language of the statute is the best indicator of the Legislature's intent. In Section 411.209, the Legislature incorporated communications as the term in used and intended in Section 30.06.

Section 30.06 is a criminal statute which makes it a Class A misdemeanor (in the case of oral communications) if a license holder (1) carries a handgun on property under the authority of the concealed handgun license and (2) received notice that entry on the property by a license holder with a concealed handgun was forbidden. Tex. Penal Code § 30.06. "A person receives notice if . . . someone with apparent authority to act for the owner provides notice to the person by oral . . . communication." *Id.*

The question then becomes at what point does an oral statement give rise to notice and criminal liability for the license holder. The question triggers a balance of interests between "oral communication" as defined in an Section 30.06 criminal context and as defined in the context of Section 411.209. A concealed handgun license holder, who may be subject to criminal liability, would reasonably wish to have a narrow interpretation that prevents application of the statute without express notice of the basis and authority for the exclusion. The City, in this case, would likewise prefer a limited interpretation as it will limit what types of notice are violative of Section 411.209. On the other hand, a private property owner, who does not want concealed handgun on his or her property, would reasonably want a broader application of the statute to allow flexibility in the oral communications to invoke Section 30.06 criminal application. Likewise, the OAG, in this case, wants a broad application of Section 30.06 (no "magic words" required) in order to invoke its enforcement obligations in the Section 411.209 liability context and limit what it sees as improper prohibition by government entities.

On one hand, in this case, a limited interpretation of Section 30.06 could lead to the result where the City is not in violation for improperly prohibit handguns only because it provided an inaccurate reasoning for the prohibition.[5] A result under Section 411.209 that seemingly endorses a governmental entity's inaccurate statement over complying with its obligation to allow license holders to carry a handgun on government property is likely an absurd result and counter to the Legislature's intent of Section 411.209.

On the other hand, an overly broad interpretation could lead to the result where a license holder is found guilty of trespass under Section 30.06 when a property owner states, "No handguns" without further explanation. Would this statement adequately give notice to the license holder that he or she is subject to criminal liability under Section 30.06? Justice Gray of the Waco Court of Appeals suggests that this would not be sufficient. *Tafel v. State*, 524 S.W.3d

[5] The Court addresses the City's reliance on the courthouse exception below.

642, 671 (Tex. App.—Waco 2016, pet. denied). He concluded that oral communications, like written communications, should reference Section 30.06 to adequately give notice to the license holder of his potential criminal liability. *Id.* Section 30.06 is about notice—not knowledge—in determining whether the potential criminal defendant is informed of the basis of the exclusion and the owner's authority under Section 30.06. *See id.* Criminal liability without notice of the basis seems counter to the Legislature's intent of Section 30.06, especially given the Legislature's strict requirements for "written communication."[6]

On the summary judgment record, the OAG has not conclusively established that the oral statements of the security guards at City Hall constitute oral communications pursuant to Texas Penal Code Section 30.06 and Texas Government Code Section 411.209, but have presented some evidence that the oral statements made to the investigators could qualify as an "oral communication." Therefore, and subject to the discussion below, the City's Plea to the Jurisdiction and the OAG's Motion for Summary Judgment are denied as to the oral statements made by the security guards at City Hall.

B. Is the City Able to Exclude License Holders Under Texas Penal Code Section 46.03 or 46.035?

In their briefings, Defendants contend that City Hall includes three types of government property that would allow the City to prohibit license holders from carrying handguns in the governmental building: (1) the courthouse exception (Tex. Penal Code § 46.03(a)(3)); (2) school-sponsored activity exception (Tex. Penal Code § 46.03(a)(1); and (3) the open meetings exception (Tex. Penal Code § 46.035(c)). Section 411.209(a) is inapplicable to a governmental entity that is authorized to prohibit license holders from carrying handguns under Texas Penal Code Sections 46.03 and 46.035.

1. The Courthouse Exception

Defendants argue that City Hall is the premises of government court or offices utilized by the court. Defendants presented some evidence that City Hall is used by municipal judges for

[6] In this case, Defendants did not rely on Section 30.06—but on Section 46.03, which has no notice requirement. It, therefore, makes some sense that Defendants would not reference Section 30.06, and it would not be implicated in prohibiting license holders from the property. For purposes of the motion and plea before the Court, the Court is not a factfinder and must determine the motion and plea as a matter of law.

community court and teen court on certain days throughout the month, which would allow Defendants to prohibit weapons and provide notice in City Hall.

The OAG responded that application of Section 46.03(a)(3) is limited because (1) the City is only entitled to limit handguns for the portion of the building that the government court or its offices uses and (2) the City only utilizes portions of City Hall as a court for a couple days each month.

a. Building or Portion of a Building

Section 46.03(a)(3) creates criminal liability for a person who possesses a firearm (or other weapon) "on the premises of any government court or offices utilized by the court." Section 46.03 incorporates Section 46.035(f)(3)'s definition of "premises," meaning "a building or a portion of a building." The OAG argues that, to give meaning to the entire definition, the Court must apply the narrower interpretation in this case; otherwise, the City would be able to prohibit handguns for an entire building for one small court in violation of the Legislature's intent for Section 411.209. Defendants note that "premises" definition is disjunctive, allowing for application for either the broader "building" or the narrower "portion of a building."

The Court agrees with the Defendants' position that either or both satisfy the definition of premises. Perhaps telling is replacing the defined term with its definition: "A person commits an offense if the person intentionally . . . possesses . . . a firearm . . . [in] [a building or a portion of a building] of any government court or offices utilized by the court." Again, Section 43.06 is criminal in nature and demonstrates the elements of what must be shown to subject a person to criminal liability. In *Dupree v. State*, the Texarkana Court of Appeals, in reviewing a criminal case involving Section 46.03, it concluded that the evidence was legally insufficient because "there is no evidence that Dupree possessed the firearm in a building or a portion of a building on the campus of Kilgore College." 433 S.W.3d 788, 792 (Tex. App.—Texarkana May 16, 2014, no pet.). The unambiguous meaning from the language of the statute shows that prosecutors could demonstrate this element by proving that a defendant possessed the firearm in a building or a portion of a building.

Because Section 411.209 incorporates Section 46.03 and, therefore, its definitions, a governmental entity may prohibit handguns, pursuant to Section 46.03(a)(3), in a building *or* a

portion of a building. In this case, if City Hall is a government court or offices utilized by the court, firearms may be prohibited from the entire building.

b. Timing of Exception

Having decided that City Hall may prohibit firearms throughout the building, the remaining question is, "When does City Hall qualify as a government court or offices?" From the record before the Court, it appears that Defendants' evidence refers to courts, temporarily occupying space at City Hall for only a few days each month. Defendants argue that, because City Hall is the premises of government court at certain points throughout the month, it may prohibit firearms at all times without violating Section 411.209. The OAG responds that court three to four times a month cannot authorize prohibition of firearms at all times.

The Court agrees with the OAG that firearms, in the case of court at City Hall, may only be prohibited on the days when court or its offices are conducted at City Hall. However, on the record before the Court, it cannot determine the days that court used City Hall as a government court and whether the OAG's asserted violations include those days. Therefore, a fact issue exists as to which days are potential violations versus potentially exempted. In light of this fact issue, among the others, summary judgment is improper and should be denied.

2. School-Sponsored Activity

Defendants also argue that they may provide notice prohibiting a license holder from bringing a weapon into City Hall because City Hall qualifies under the school-sponsored activity exception, arguing that its art gallery—the People's Gallery—is a school sponsored activity. The City argues that, because the People's Gallery includes works by students and is conducted in cooperation with Austin Independent School District. The OAG acknowledges that City Hall may properly prohibit firearms on "field trips" or when an activity is school-sponsored and "is conducted."

The Court agrees with the OAG that Section 43.06(a)(1) contemplates that the grounds or building may only prohibit weapons under this provision while a school-sponsored activity is being conducted. The People's Gallery, by passively presenting works of art from AISD students (even if selected in cooperation with AISD), is not a school-sponsored activity pursuant to Section 43.06(a)(1). Defendants also presented some evidence that City Hall hosts AISD events,

like the People's Gallery award reception, in which students are invited to City Hall as part of a school-sponsored activity. During these events, Defendants may be entitled to rely on Section 43.06(a)(1). However, on the record before the Court, it cannot determine the days City Hall hosted school-sponsored activities and whether the OAG's asserted violations include those days.

3. City Meetings

Defendants argue that it may provide notice prohibiting firearms because City Hall hosts open meetings under Texas Government Code Chapter 551 that qualify under Texas Penal Code Section 46.035(c). The OAG responds that Section 46.035(c) is very limited in scope as it only subjects a license holder to criminal liability if he or she carries "in the room or rooms where a meeting of a government entity is held." Additionally, the OAG argues that it only applies when a meeting is properly convened as an open meeting under Chapter 551 of the Texas Government Code.

The Court agrees with the OAG's position that Section 46.035(c) is limited only to rooms where the open meeting is being held. Therefore, Defendants may provide notice prohibited by Section 411.209 for those meeting rooms; however, the remainder of City Hall is not a prohibited place under Section 46.035(c) that would allow City Hall to provide notice under this particular exception of Texas Government Code Section 411.209.

C. Did the OAG Properly Provide Pre-Suit Notice?

Defendants argue that Section 411.209's waiver of sovereign immunity was not invoked because the statute requires that the OAG give pre-suit notice to the chief administrative officer of the political subdivision. Defendants note that the OAG sent a letter to Mayor Adler, informing the City that OAG considered the City in violation of Section 411.209. Defendants provided evidence that Mayor Adler is not the chief administrative officer; instead, pursuant to the City's governing documents, the city manager is the chief administrative officer. The OAG responded that the purpose of the provision is to provide notice to the governmental entity, which it did by its letter to the mayor with a copy to the law department. It argues that it substantially complied, which is all that should be required.

The Court rejects the argument of substantial compliance and finds that the OAG failed to provide pre-suit notice in accordance with Section 411.209(f). However, the OAG provided

evidence in its response to Defendants' Plea to the Jurisdiction that on March 2, 2017, it cured this defect by sending a letter to Interim City Manager Elaine Hart, enclosing the previous letter sent to Mayor Adler. Because the OAG has provided notice to the chief administrative officer and the 15-day cure period has run, the Court denies Defendants' Plea to the Jurisdiction as to the OAG's failure to comply with Section 411.209(f).

IV. CONCLUSION

In summary in accordance with the above discussion, the Court renders the following rulings:

- Defendants' Plea to the Jurisdiction is granted as to the etched glass symbol at the entrance of City Hall;
- Defendants' Plea to the Jurisdiction is denied in all other respects; and
- Plaintiff's Motion for Summary Judgment is denied.

Sincerely,

Lora J. Livingston
Judge, 261st District Court

cc: Ms. Velva L. Price, Travis County District Clerk

B:

December 22, 2017, Order Granting Defendant's Plea to the Jurisdiction in Part (CR.388)

CAUSE NO. D-1-GN-16-003340

KEN PAXTON, TEXAS ATTORNEY GENERAL,	§	**IN THE DISTRICT COURT**
Relator/Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF AUSTIN, MAYOR STEVE ADLER, ORA HOUSTON, DELIA GARZA, SABINO RENTERIA, GREGORIO CESAR, ANN KITCHEN, DON ZIMMERMAN, LESLIE POOL, ELLEN TROXCLAIR, KATHIE TOVO, and SHERI GALLO, each in their official capacity,	§	**53rd JUDICIAL DISTRICT**
Respondents/Defendants.	§	**TRAVIS COUNTY, TEXAS**

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND GRANTING-IN-PART AND DENYING-IN-PART PLEA TO THE JURISDICTION

On the 31st day of August 2017, the Court heard Plaintiff's Motion for Summary Judgment and Defendants' Plea to the Jurisdiction. The Court, having considered the pleadings, the plea, the motions, any responses or replies, evidence, and arguments of counsel, is of the opinion that the Motion for Summary Judgment should be and is denied and the Plea to the Jurisdiction should be and is granted-in-part and denied-in-part.

IT IS THEREFORE ORDERED that Defendants' Plea to the Jurisdiction is granted-in part and denied-in-part. Defendants' Plea is granted as to Plaintiff's claim that the etched glass symbol of a gun with circle around it and a line through it is a violation of Texas Government Code Section 411.209. Defendants' Plea is denied is all other respects.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is denied.

SIGNED this 22nd day of December, 2017.

JUDGE LORA J. LIVINGSTON

C:

January 17, 2019, Letter Announcing Bench Trial Rulings (CR.2685-86)

261ST DISTRICT COURT

LORA J. LIVINGSTON
Judge
(512) 854-9309

BRENT D. MCCABE
Staff Attorney
(512) 854-9625

MARY JANE LAWSON
Court Operations Officer
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TRAVIS COUNTY COURTHOUSE
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(512) 854-9457

LA SONYA THOMAS
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January 17, 2019

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Charles Eldred
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Sameer S. Birring
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P.O. Box 1546
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Via email: Sameer.birring@austintexas.gov
Via email: Hannah.vahl@austintexas.gov

Re: Cause No. D-1-GN-16-003340; *Paxton v. City of Austin, et al.*; In the 53rd District Court of Travis County, Texas

Dear Counsel:

I have considered the pleadings, any responses or replies, evidence and the arguments of counsel and hereby make the following rulings:

- Plaintiff met its burden to establish a violation of Section 411.209(a) on the following dates:
  - April 4, 2016;
  - April 6, 2016;
  - April 12, 2016;
  - July 1, 2016;
  - July 29, 2016; and
  - September 7, 2016.

  Defendants did not meet their burden to establish an exception to Section 411.209(a) on any of the dates listed above.
- Plaintiff did not meet its burden to establish a violation on any other date.

- The Court assesses a civil penalty of $1,500.00, for each violation, and a total of $9,000.00 for all violations.
- As for Plaintiff's request for a writ of mandamus, Plaintiff presents no evidence that the City will not comply with these rulings, and Plaintiff has a remedy for subsequent violations, if necessary. The Court denies Plaintiff's request for a writ of mandamus.

Now that you have my rulings, please contact my staff, if necessary, to set a hearing to address any matters remaining from the bifurcation. If no matters remain pending, please prepare a judgment, circulate it for approval as to form, and submit it for signature at your earliest convenience. If you have any questions, please contact my Staff Attorney, Brent McCabe.

Sincerely,

Lora J. Livingston
Judge, 261st District Court

cc: Ms. Velva L. Price, Travis County District Clerk

D:

June 5, 2019, Letter Awarding Attorney's Fees and Costs (CR.2917-18)

261ST DISTRICT COURT

LORA J. LIVINGSTON
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(512) 854-9309

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June 5, 2019

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Via email: sameer.birring@austintexas.gov
Via email: hannah.vahl@austintexas.gov

Re: Cause No. D-1-GN-16-003340; *Paxton v. City of Austin, et al.*; In the 53rd District Court of Travis County, Texas

Dear Counsel:

I have considered the Application for Attorney's Fees and Other Recoverable Costs, response, reply, evidence and the arguments of counsel and hereby GRANT-IN-PART and DENY-IN-PART Plaintiff's Application in the following manner:

- Plaintiff is awarded attorney's fees in the amount of $ 25,000.00.
- Plaintiff is awarded recoverable and court costs in the amount of $ 10,952.10.
- Plaintiff is awarded conditional appellate attorney's fees in the amounts:
  - $ 7,500.00, if appealed to the Court of Appeals;
  - $ 5,000.00, if the matter is determined at the petition for review stage at the Supreme Court;
  - An additional $ 15,000.00, if the merits are fully briefed at the Supreme Court; and
  - An additional $ 10,000.00, if oral argument is conducted by the Supreme Court.
- Plaintiff's application for attorney's fees beyond this award is DENIED.

Now that you have my rulings, please prepare a judgment, circulate it for approval as to form, and submit it for signature at your earliest convenience. If you have any questions, please contact my Staff Attorney, Brent McCabe.

Sincerely,

Lora J. Livingston
Judge, 261st District Court

cc: Ms. Velva L. Price, Travis County District Clerk

E:

August 1, 2019, Corrected Final Judgment
(CR.2934-36)

NO. D-1-GN-16-003340

KEN PAXTON,	§	IN THE DISTRICT COURT
TEXAS ATTORNEY GENERAL,	§	
Relator/Plaintiff,	§	
	§	
	§	
v.	§	
	§	
CITY OF AUSTIN, MAYOR STEVE	§	53RD JUDICIAL DISTRICT
ADLER, ORA HOUSTON, DELIA	§	
GARZA, SABINO RENTERIA,	§	
GREGORIO CASAR, ANN KITCHEN,	§	
DON ZIMMERMAN, LESLIE POOL,	§	
ELLEN TROXCLAIR, KATHIE TOVO,	§	
and SHERI GALLO, each in their	§	
official capacity,	§	
Respondents/Defendants.	§	TRAVIS COUNTY, TEXAS

CORRECTED FINAL JUDGMENT[1]

On January 7 and January 8, 2019, the parties appeared for a bench trial in this case. After reviewing the pleadings and any responses or replies on file and considering the arguments and evidence, including those presented on Relator/Plaintiff's attorney's fees claim which was separately set for submission on March 14, 2019, the Court renders this Final Judgment as follows:

(1) The Court FINDS that Plaintiff/Relator met his burden of establishing a violation of Section 411.209(a) of the Texas Government Code on the following dates:

- April 4, 2016;
- April 6, 2016;
- April 12, 2016;
- July 1, 2016;
- July 29, 2016;
- September 7, 2016

[1] This corrected final judgment is intended to replace the Court's Judgment of July 1, 2019. On July 30, 2019, the parties submitted an Agreed Motion to Correct the Judgment. By signing this judgment, the Court grants that motion.

(2) The Court FINDS that Plaintiff/Relator failed to establish a violation on any other date.

(3) The Court FINDS that Defendants failed to establish an exception to Section 411.209(a) of the Texas Government Code on any of the dates listed above.

(4) The Court FINDS that Plaintiff/Relator failed to show that Defendants will not comply with the Court's rulings and that Plaintiff has remedy for subsequent violations, if any, against Defendants City of Austin, Mayor Steve Adler, Ora Houston, Delia Garza, Sabino Renteria, Gregorio Casar, Ann Kitchen, Don Zimmerman, Leslie Pool, Ellen Troxclair, Kathie Tovo, and Sheri Gallo.

(5) It is ORDERED that Plaintiff/Relator's request for mandamus relief against Defendants Mayor Steve Adler, Ora Houston, Delia Garza, Sabino Renteria, Gregorio Casar, Ann Kitchen, Don Zimmerman, Leslie Pool, Ellen Troxclair, Kathie Tovo, and Sheri Gallo is DENIED.

(6) It is ORDERED that Defendant City of Austin shall pay $1,500 for each of the six violations found, for a total of $9,000 in civil penalties, made payable to the credit of the compensation to victims of crime fund in accordance with Section 411.209(e) of the Texas Government Code.

(7) It is ORDERED that Defendant City of Austin pay Plaintiff/Relator's attorney's fees as follows:

a. $25,000.00 in attorney's fees through the date of Final Judgment;

b. An additional amount of $7,500.00 if Defendant appeals this Final Judgment to the Texas Third Court of Appeals and Defendant is ultimately unsuccessful;

c. An additional amount of $5,000.00 if Defendant petitions the Texas Supreme Court for review of this Final Judgment, and Defendant is ultimately unsuccessful;

d. An additional amount of $15,000.00 if Defendant petitions the Texas Supreme Court for review of this Final Judgment, if the merits are fully briefed at the Texas Supreme Court, and Defendant is ultimately unsuccessful;

e. An additional amount of $10,000 if Defendant petitions the Texas Supreme Court for review of this Final Judgment, and if oral argument is conducted by the Texas Supreme Court, and Defendant is ultimately unsuccessful.

(8) It is ORDERED that Defendant City of Austin pay Plaintiff/Relator recoverable expenses and court costs in the amount of $10,952.10.

(9) All relief not expressly granted herein is hereby denied.

This judgment is final, disposes of all claims and all parties, and is appealable.

SIGNED on this the 1st day of August, 2019

Lora J. Livingston

THE HONORABLE JUDGE LORA J. LIVINGSTON
JUDGE PRESIDING

AGREED AS TO FORM:

/s/ Cleve W. Doty
Cleve W. Doty
Assistant Attorney General
State Bar No. 24069627
Office of the Attorney General of Texas
Administrative Law Division
P.O. Box 12548, Capitol Station
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ATTORNEY FOR RELATOR/PLAINTIFF

/s/ Sameer S. Birring
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ATTORNEY FOR DEFENDANTS

F:

Text of Texas Government Code § 411.209 (2015)

Tex. Gov't Code § 411.209 (2015). WRONGFUL EXCLUSION OF CONCEALED HANDGUN LICENSE HOLDER.

(a) A state agency or a political subdivision of the state may not provide notice by a communication described by Section 30.06, Penal Code, or by any sign expressly referring to that law or to a concealed handgun license, that a license holder carrying a handgun under the authority of this subchapter is prohibited from entering or remaining on a premises or other place owned or leased by the governmental entity unless license holders are prohibited from carrying a handgun on the premises or other place by Section 46.03 or 46.035, Penal Code.

(b) A state agency or a political subdivision of the state that violates Subsection (a) is liable for a civil penalty of:

(1) not less than $1,000 and not more than $1,500 for the first violation; and

(2) not less than $10,000 and not more than $10,500 for the second or a subsequent violation.

(c) Each day of a continuing violation of Subsection (a) constitutes a separate violation.

(d) A citizen of this state or a person licensed to carry a concealed handgun under this subchapter may file a complaint with the attorney general that a state agency or political subdivision is in violation of Subsection (a) if the citizen or person provides the agency or subdivision a written notice that describes the violation and specific location of the sign found to be in violation and the agency or subdivision does not cure the violation before the end of the third business day after the date of receiving the written notice. A complaint filed under this subsection must include evidence of the violation and a copy of the written notice.

(e) A civil penalty collected by the attorney general under this section shall be deposited to the credit of the compensation to victims of crime fund established under Subchapter B, Chapter 56, Code of Criminal Procedure.

(f) Before a suit may be brought against a state agency or a political subdivision of the state for a violation of Subsection (a), the attorney general must investigate the complaint to determine whether legal action is warranted. If legal action is

warranted, the attorney general must give the chief administrative officer of the agency or political subdivision charged with the violation a written notice that:

(1) describes the violation and specific location of the sign found to be in violation;

(2) states the amount of the proposed penalty for the violation; and

(3) gives the agency or political subdivision 15 days from receipt of the notice to remove the sign and cure the violation to avoid the penalty, unless the agency or political subdivision was found liable by a court for previously violating Subsection (a).

(g) If the attorney general determines that legal action is warranted and that the state agency or political subdivision has not cured the violation within the 15–day period provided by Subsection (f)(3), the attorney general or the appropriate county or district attorney may sue to collect the civil penalty provided by Subsection (b). The attorney general may also file a petition for a writ of mandamus or apply for other appropriate equitable relief. A suit or petition under this subsection may be filed in a district court in Travis County or in a county in which the principal office of the state agency or political subdivision is located. The attorney general may recover reasonable expenses incurred in obtaining relief under this subsection, including court costs, reasonable attorney's fees, investigative costs, witness fees, and deposition costs.

(h) Sovereign immunity to suit is waived and abolished to the extent of liability created by this section.